No. 87-382

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G. W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

D.O.L. No. 85047532

REPLY BRIEF

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Dated: June 21, 1988

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REPLY BRIEF

The petitioners respectfully submit this brief to discuss some matters presented by respondents in their supplemental brief in opposition and by the Seneca Nation of Indians in its proposed brief *amicus curiae* in opposition to the petition, which the Seneca Nation has moved the Court for permission to file.

I. Respondents argue at Point IA of their supplemental brief in opposition that because the registration and reporting requirements of the New York Tax Law add to the cost of doing business in New York and would, if enforced against them, be reflected in the wholesale price of the motor fuel sold to their Indian customers, application of the law to them must be held to be preempted. This argument is without merit. The mere fact that the New York Tax Law touches upon the relationship between respondents and their Indian customers does not, in and of itself, require a holding of preemption. As was cogently observed by the United States in its *amicus curiae* brief, "[u]nder the Indian Trader statutes, the mere presence of an Indian retailer in the chain of distribution from one non-Indian to another does not constitute an insuperable barrier to a reasonable (and nondiscriminatory) state statutory scheme that provides for the passing through of liability for taxes that the State may lawfully impose on the non-Indian consumer" (Brief for the United States, p. 14).

Under the New York tax scheme the registration and reporting requirements which apply to all motor fuel distributors in the State, no less than the requirement that the distributor prepay the applicable excise and sales taxes, are designed to prevent the avoidance of tax by retailers and their taxable customers. Since the costs incident to such registration and reporting may be passed through and borne, as are the taxes, by the ultimate non-

Indian consumers, it follows that the inclusion of the additional amounts in the wholesale price is a "minimal burden" which, under the holdings of this Court in *Moe v. Confederated Salish and Kootenai Tribes,* 425 US 436 (1976), and *Washington v. Confederated Tribes,* 447 US 134 (1980), is entirely justified.

II. The Seneca Nation's suggestion that this case is not ripe for review is similarly without merit. The holding of the Court of Appeals, which is binding upon the lower New York courts, is that the application of the New York Tax Law to the respondents is impermissible because "no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is preempted by the federal trader laws * * *" (A14). This holding is clearly determinative of the outcome of any further State court proceedings. The Seneca Nation's assertion that the case is not yet "worthy of consideration by this Court" because the Court of Appeals' decision is "interlocutory" (Br, p 3) is flat wrong. Any delay in this Court's resolution of this case is not only unwarranted but could severely prejudice the State in its ability to collect other lawfully enacted taxes against non-Indians doing business on Indian reservations.

We believe the Solicitor General is correct in observing that the Court of Appeals "gave an unduly broad preemptive effect to the Indian trader statutes * * *" (Brief for United States, p 6), and quite properly urged this Court to grant certiorari. We believe also that this petition may be disposed of properly by vacating the judgment of the Court of Appeals and remanding the case to that Court for further consideration in light of the views expressed by the Solicitor General and of the position of the petitioners, evidenced by their newly proposed regulations.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated: Albany, New York
June 21, 1988

Respectfully submitted,

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